

IN THE SUPREME COURT OF IOWA

Case No. 15-0741

JASON CANNON,

Appellant,

v.

**BODENSTEINER IMPLEMENT CO.,
ECK & GLASS, INC. d/b/a EPG INSURANCE CO.,
And CNH AMERICA, LLC, d/b/a CASE IH,**

Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR CLAYTON COUNTY
THE HONORABLE JOHN BAUERCAMPER

**FINAL BRIEF OF APPELLEE
ECK & GLASS, INC. d/b/a EPG INSURANCE CO.**

Michael A. McEnroe, AT0005251
Erin Patrick Lyons, AT0004800
DUTTON, BRAUN, STAACK
& HELLMAN, P.L.C.
3151 Brockway Road
P.O. Box 810
Waterloo, Iowa 50704
(319) 234-4471
(319) 234-8029 (FAX)
mcenroem@wloolaw.com
lyonse@wloolaw.com

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STATEMENT OF THE ISSUES¹

DID THE COURT ERR IN AWARDING SUMMARY JUDGMENT TO EPG ON CLAIMS OF BREACH OF CONTRACT?

CASES

Brandt v. Boston Scientific Corp., 792 N.E.2d 296 (Ill. 2003)
Chariton Feed and Grain, Inc. v. Harder, 369 N.W.2d 777, 789
(Iowa 1985)
Design Data Corp. v. Maryland Casualty Co., 503 N.W.2d 552
(Neb. 1993)
Metropolitan Transfer Station, Inc. v. Design Structures, Inc.,
328 N.W.2d 532 (Iowa App. 1982)
Midwest Hatchery & Poultry Farms, Inc. v. Doorenbos
Poultry, Inc., 783 N.W.2d 56 (Iowa App. 2010)
Port Huron Machinery Co. v. Wohlers, 207 Iowa 826,
221 N.W. 843 (1928)
Powell v. McBlain, 222 Iowa 799, 269 N.W. 883 (1936)
Richards v. Midland Brick Sales Co., Inc., 551 N.W.2d 649
(Iowa App. 1996)
RMP Industries Ltd. v. Linen Center, 386 N.W.2d 523
(Iowa App. 1986)
Sheer Const., Inc. v. W. Hodgman and Sons, Inc., 326 N.W.2d 328
(Iowa 1982)

STATUTES

Iowa Code § 554.2103(1)(d)
Iowa Code § 554.2105(1)
Iowa Code § 554.2106
Iowa Code § 554.2313
Iowa Code § 554.2719

¹ EPG takes no position with regard to the Appellant's Statement of the Issues as it relates to its co-appellees.

IOWA COURT RULES

Iowa R. Civ. P. 1.981(3)

OTHER SOURCES

Iowa Civil Jury Instruction No. 2400.1

Iowa Civil Jury Instruction No. 2400.6

ROUTING STATEMENT

This case involves the application of existing legal principals, and, pursuant to Iowa R. App. P. 6.1101(3)(a), this case appropriately should be transferred to the Iowa Court of Appeals.

STATEMENT OF THE CASE

Appellee Eck & Glass, Inc., d/b/a EPG Insurance Co., (hereinafter “EPG”), agrees with the Appellant’s Statement of the Case as it relates to the procedural aspects of the Appellant’s case against EPG. EPG takes no position with regard to the Appellant’s Statement of the Case as it relates to its co-appellees.

STATEMENT OF FACTS²

The Plaintiff, Jason Cannon, has pled that Defendant Eck & Glass, Inc., d/b/a EPG, Inc., (hereinafter “EPG”), has “refused to pay for or reimburse the cost of repairs or replacement of covered parts of [his] tractor” under the Purchased Protection Plan administered by EPG with respect to that tractor. (Plaintiff’s Second Amendment to Amended and Substituted Petition, ¶ 67, App.

² EPG takes no position with regard to the Appellant’s Statement of the Facts as it relates to its co-appellees.

56). EPG has denied that allegation, and it has affirmatively stated that it appropriately paid all claims submitted to it with regard to the tractor at issue. (EPG's Answer and Affirmative Defenses, ¶ 67, App. 123-124).

EPG did everything it was supposed to do during the life of the "Commercial Equipment Purchased Protection Plan," or Purchased Protection Plan plan, it issued with respect to this tractor.³ A copy of the applicable Commercial Equipment Purchased Protection Plan is attached to the Affidavit of Dale Hendrix, EPG's Exhibit 1. (App. 680-684). The Purchased Protection Plan at issue, with certain stated restrictions, "is limited to reimbursement of the cost of parts, and labor for repairs, approved by [EPG], and made by a service center authorized by [EPG], if a defect in material or workmanship is found in the [tractor]; ..." (Commercial Equipment Purchased Protection Plan attached to EPG's Exhibit 1, ¶ 4, App. 681).

Co-Defendant Windridge Implements, LLC, was the "service center" in this particular case. Co-Defendant Windridge Implements, LLC, has provided extensive discovery responses demonstrating how it dealt with the Purchased

³ Though the "Retail Purchaser" is listed on the document as having been Gansen Pumping of Zwingle, Iowa, the document attached to EPG's Exhibit 1 is the Commercial Equipment Purchased Protection Plan applicable to the Case IH 305 tractor at issue in this case (App. 680-684). Plaintiff Jason Cannon was a subsequent purchaser of the tractor in question, and it is agreed that the Commercial Equipment Purchased Protection Plan followed the tractor.

Protection Plan at issue and how it billed for its work with regard to this tractor. Windridge Implements' Interrogatory responses were attached to EPG's summary judgment motion as Exhibit 2 (App. 685-718).

Co-Defendant Windridge Implements, LLC, has stated the following with respect to the amounts it charged to EPG under the tractor Purchased Protection Plan at issue:

Attached as Exhibits B and C are two service invoices from Windridge Implements, L.L.C. forwarded to EPG, Inc. seeking payment for warrantable items:

Exhibit B	W19723	\$21,237.03
Exhibit C	W21702	\$21,593.93

The attached invoice marked Exhibit B was submitted in the amount of \$21,237.03 by Windridge Implements, L.L.C. to EPG, Inc. for payment. Of that \$21,237.03 amount, the sum of \$19,458.21 was paid by EPG as shown by the attached Exhibit E. The remaining difference of \$1,778.82 was written off by Windridge.

Additionally, the attached invoice Exhibit C from Windridge Implements was submitted to EPG, Inc. in the amount of \$21,593.93. Of this amount, EPG paid the sum of \$19,326.95 as shown by the attached Exhibit F. A difference of \$2,266.08 was written off by Windridge Implements.

...

(EPG.'s Exhibit 2, p. 7, App. 691, and Exhibits B, C, E, and F attached to Exhibit 2; App. 700-710, 716-717). Thus, far from refusing to pay under this Purchased Protection Plan, EPG paid out \$38,7850.16 related to the repair of the tractor in

question, and an additional \$4,044.90 was written off at EPG's request.

As Windridge Implements, L.L.C., stated below, the invoices for service Windridge Implements believed to be covered by EPG's Purchased Protection Plan were, in fact, submitted to EPG for payment and were not submitted to the Plaintiff for payment. (EPG's Exhibit 2, pp. 8, 9; App. 692-693). Further, according to Windridge Implements, L.L.C., no amounts are due and owing by Mr. Cannon to Windridge for service to the Case IH 305 tractor owned by Mr. Cannon. (EPG's Exhibit 2, p. 6; App. 690).

According to Windridge Implements, L.L.C., Jason Cannon did pay a total of \$13,500 to Windridge Implements, L.L.C. (App. 690). The charges for which those payments were made are set out in Exhibit A to EPG's Exhibit 2 (App. 685-718). As Windridge Implements, L.L.C., has stated, those charges were for "non-warrantable work including the rental of the tractor," that is, a replacement tractor.⁴ (EPG's Exhibit 2, p. 6; App. 690). Windridge Implements, L.L.C. did not submit those charges to EPG. (See EPG's Exhibit 1, Affidavit of Dale Hendrix, ¶ 3; App. 677 (confirming that the difference, if any, between the

⁴ The cost of renting a replacement tractor is not covered under the warranty in question because "Protection under the Plan is limited to reimbursement of the cost of parts, and labor for repairs, approved by [EPG], and made by a service center authorized by [EPG], if a defect in material or workmanship is found in the [tractor]; ..." (Commercial Equipment Purchased Protection Plan attached to EPG's Exhibit 1, ¶ 4; App. 681).

amounts of the invoices and the amount paid on each claim was absorbed by Windridge and not passed on to Mr. Cannon)).

Mr. Cannon himself appears to have disavowed the allegation in the pleadings that EPG has “refused to pay for or reimburse the cost of repairs or replacement of covered parts of [his] tractor” under the Purchased Protection Plan administered by EPG with respect to that tractor. (Plaintiff’s Second Amendment to Amended and Substituted Petition, ¶ 67; App. 56). Mr. Cannon testified at his deposition that he believes that EPG should have paid bills that were not actually submitted to EPG for payment at all. For example, he believes that he “had to pay for the first set of or part of the first set” of brakes Windridge put on the tractor, costing him \$2,500. (Dep. of Jason Cannon, EPG’s Exhibit 3, p. 72:13-16; App. 720). He also believes that

... the numerous sets of hydraulic filters and among other oils and stuff should actually be considered into payment due to the fact that it [*i.e.*, the tractor] still has not been fixed.

(Dep. of Jason Cannon, EPG’s Exhibit 3, p. 72:16-20; App. 720).

Mr. Cannon concedes that these claims were never submitted to EPG for payment. (Dep. of Jason Cannon, EPG’s Exhibit 3, p. 74:11-13; App. 722). Mr. Cannon further concedes that EPG actually did pay the amounts Windridge reports it paid. (Dep. of Jason Cannon, EPG’s Exhibit 3, pp. 74:24-75:10; App. 722). So his only concern “at this time” is that EPG “ought to have been

presented to EPG for payment and then paid by EPG.” (Dep. of Jason Cannon, EPG’s Exhibit 3, p. 75:10-16; App. 723). Thus, according to his deposition testimony, Mr. Cannon clearly no longer believes that EPG has “refused to pay for or reimburse the cost of repairs or replacement of covered parts of [his] tractor” under the Purchased Protection Plan administered by EPG with respect to that tractor. (Plaintiff’s Second Amendment to Amended and Substituted Petition, ¶ 67; App. 56).

Scott Nordschow, service manager at Windridge, testified at his deposition that he was satisfied with EPG’s actions related to the tractor at issue in this case. (Dep. of Scott Nordschow, EPG’s Exhibit 4, p. 100:21-24; App. 729). Mr. Nordschow became familiar with EPG in his role at Windridge because EPG was, for a long time, the administrator of Purchased Protection Plan plans on Case IH products. (Dep. of Scott Nordschow, EPG’s Exhibit 4, p. 97:3-10; App. 726). He testified that EPG never failed to pay on any claim Windridge made with respect to this tractor. (Dep. of Scott Nordschow, EPG’s Exhibit 4, p. 100:8-11; App. 729). He can think of nothing that EPG could have done better with respect to this tractor. (Dep. of Scott Nordschow, EPG’s Exhibit 4, pp. 100:25-101:3; App. 729-730).

EPG has points of disagreement with Mr. Cannon over some of the facts of this case, none of which should cause a reversal of the entry of summary

judgment in EPG's favor. First, Mr. Cannon continues to argue that "[t]he extended protection plan for the powertrain extended coverage for repairs up to \$150,000 during the period of 4/21/10 through 4/20/13." (Mr. Cannon's Proof Brief, pp. 19-20). That is not a true statement. EPG admits that the Purchased Protection Plan was effective between April 21, 2010, and April 20, 2013, but EPG denies that \$150,000 is the coverage limit of the Purchased Protection Plan. Instead, the Purchased Protection Plan itself states:

Protection under the Plan is limited to reimbursement of the cost of parts, and labor for repairs, approved by the Provider, if a defect in material or workmanship is found in the Goods; provided, however, that such reimbursement, as to Goods classified as "used" at the time they are purchased by the Customer, shall not exceed, in the aggregate for all claims made under the Plan, fifty percent (50%) of the value of the Goods at the time they were purchased by the Customer. The Master Parts Schedule attached hereto, and incorporated herein by this reference, lists the only parts protected under the Plan.

(Purchased Protection Plan, ¶ 4; App. 681). The \$150,000 figure cited by the Plaintiff is not stated in the Purchased Protection Plan at issue. That is, perhaps, not a material, or difference-making, fact, but accuracy is important.

EPG also disagrees with Mr. Cannon's statement, "[a]fter this[,] the tractor's breaks failed right away[,] and the tractor was deemed unrepairable.." This statement that the tractor in question was "unrepairable" is not supported

by fact. Mr. Cannon makes absolutely no effort to prove this assertion. Mr. Cannon testified that he knew that Ryan Hillen from Case IH was working on a plan to do additional diagnostic testing on the tractor – and, subsequently, repairs – potentially involving Case IH engineers. (Cannon Depo., Aug. 20, 2014, pp. 64:17-67:24; App. 783-784). Mr. Hillen has testified, though, that those efforts to solve the problems Mr. Cannon was experiencing stopped when Mr. Cannon threatened to file the pending lawsuit. (Hillen Depo., pp. 61:9-64:3; App. 804-807). Mr. Cannon thus chose to file this lawsuit rather than seek further repairs to his tractor. That does not make the tractor “unrepairable,” contrary to Mr. Cannon’s bare assertion.

ARGUMENT:
The District Court’s Grant of Summary Judgment
In EPG’s Favor Should Be Affirmed.

I. Standard of Review and Preservation of Error.

EPG agrees that the applicable standard of review is for correction of errors at law. (Iowa R. App. P. 6.907). EPG likewise agrees that the Notice of Appeal in this case was timely.

EPG does not agree that Mr. Cannon has preserved error on the arguments presented in his brief on appeal. Error is preserved for this Court’s review where an issue was raised and decided below. (Meier v. Senecaut III, 641

N.W.2d 532, 537 (Iowa 2002)). Mr. Cannon argues that EPG “can be held responsible as an agent for the manufacturer, Case, in addition to having case being responsible under the warranty if the agency exists ...” (Mr. Cannon’s Proof Brief, p. 41). Mr. Cannon did not raise this argument below in resistance to EPG’s Motion for Summary Judgment, nor was any such non-existent argument decided.⁵ Having been neither raised nor decided, this agency argument is not preserved for this Court’s review. This Court should refuse to take up this un-preserved – and un-pled – agency argument.

More broadly, Mr. Cannon failed to preserve error on the only other argument that makes with respect to EPG – his Uniform Commercial Code-based warranty/“failed-of-its-essential-purpose” argument. Mr. Cannon did raise that argument to the District Court in his Resistance to EPG’s Motion for Summary Judgment. (Mr. Cannon’s Resistance, ¶ 4, App. 733; Mr. Cannon’s Memorandum in Support of Summary Judgment Resistance, pp. 3-4; App. 737-738). However, the District Court never decided that warranty/“failed-of-its-essential-purpose” argument. Instead, the District Court’s decision was quite

⁵ The Iowa Rules of Appellate Procedure require the Appellant to provide a “statement addressing how the issue was preserved for appellate review, with references to the places in the record where the issue was raised and decided.” (Iowa R. App. P. 6.903(2)(g)(1)). Mr. Cannon did not do that with respect to this agency argument presented in his appellate brief.

narrow. The District Court decided this case as follows:

In order for Cannon to prove his Count VII Claim for Breach of Contract against defendant Eck & Glass, Inc. d/b/a EPG Insurance, Inc., he must establish all of the elements required by Iowa Civil Jury Instruction No. 2400.1. [underlining in original.] See also the authorities cited in the instructions.

Extensive discovery was provided and presented to the court in support of this motion. The court is satisfied that these materials clearly support the contention that the unpaid bills of around \$13,500.00 were for repairs not covered by the PPP [*i.e.*, the Purchased Protection Plan].

(District Court Ruling, p. 7; App. 142). The very next time the District Court mentioned EPG is when the District Court stated EPG's Motion for Summary Judgment was granted. (District Court Ruling, pp. 8-9; App. 143-144). Thus, the District Court never decided Mr. Cannon's warranty/"failed-of-its-essential-purpose" argument. Mr. Cannon's warranty/"failed-of-its-essential-purpose" argument was therefore not preserved for this Court's review.

Since the Iowa appellate courts no longer follow the "decided by necessary implication" rule, Mr. Cannon cannot be heard to argue that the District Court must have implicitly decided an issue which it did not explicitly decide. It has been written:

Recent opinions from the Iowa Supreme Court have cast doubt on the continuing vitality of the "decided by necessary implication" rule. In *Teamsters Local*

Union 421 v. City of Dubuque, [706 N.W.2d 709, 713 (Iowa 2005),] the court stated: “Gotto argues the district court impliedly decided the municipal restriction was facially valid when it ruled that the policy applied to him. However, our preservation-of-error rule does not draw any such assumptions.

In light of *Teamsters Local Union 421*, litigants should not rely on implicit findings. The conservative course of action would be a request, through a rule 1.904(2) motion or otherwise, that the district court expressly state the implicit finding at issue.

(Thomas A. Mayes and Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 DRAKE L. REV. 39, 68-69 (2006) (footnotes omitted)). Mr. Cannon made no Iowa R. Civ. P. 1.904(2) motion, and he did nothing else to request an explicit ruling from the Court on this issue he wished to advance on appeal. As established above, the Court made no explicit ruling on Mr. Cannon’s warranty/“failed-of-its-essential-purpose” argument. For this reason, Mr. Cannon failed to preserve the error he now asserts on appeal.

This Court should not reverse the entry of summary judgment in EPG’s favor on the basis of an argument Mr. Cannon failed to preserve. EPG respectfully requests that the District Court’s decision be affirmed.

II. Standards for Motions for Summary Judgment.

The District Court’s entry of summary judgment in EPG’s favor should

be affirmed. Summary judgment shall be rendered if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (Iowa R. Civ. P. 1.981(3) (2013); Schaefer v. Cerro Gordo County Abstract Co., 525 N.W.2d 844, 846 (Iowa 1994)).

The moving party has the burden to show the nonexistence of a material fact and the evidence must be viewed in the light most favorable to the resisting party. (Farm Bureau Mut. Ins. Co. v. Mine, 424 N.W.2d 422, 423 (Iowa 1988); Thorp Credit, Inc. v. Gott, 387 N.W.2d 342, 343 (Iowa 1986)). A factual issue is material when “the dispute is over facts that might affect the outcome of the suit, given the applicable law.” (Walker v. Gribble, 689 N.W.2d 104, 108 (Iowa 2004) (*quoting* Fouts ex rel. Jensen v. Mason, 592 N.W.2d 33, 35 (Iowa 1999))). A fact question is generated if reasonable minds can differ on how the issue should be resolved. (Id. at 108-09).

A party opposing a motion for summary judgment is not entitled to rely on the hope of a subsequent magical appearance at trial of a genuine issue of material fact. (Prior v. Rathjen, 199 N.W.2d 327, 331 (Iowa 1972)). If the moving party has provided documentation which would suggest no genuine issue of material fact exists then the non-moving party must set forth specific facts

establishing a genuine issue. (Konz v. Ehly, 451 N.W.2d 504, 505-06 (Iowa Ct. App. 1989)). If the opposing party has no factual support for an outcome determinative element of their claim, then the moving party is entitled to summary judgment. (Wilson v. Darr, 553 N.W.2d 579, 582 (Iowa 1996); Griglione v. Martin, 525 N.W.2d 810, 813-814 (Iowa 1994)).

In this case, there was no genuine issue of any material fact, and EPG was entitled to judgment in its favor as a matter of law. EPG therefore respectfully requests that the District Court's entry of summary judgment in EPG's favor be affirmed.

III. EPG was Justly Entitled to Summary Judgment on Mr. Cannon's Breach of Contract Claim Against EPG.

The District Court was correct in determining that Mr. Cannon could not succeed on his claim against EPG for breach of contract. In order to recover on a breach of contract claim, Mr. Cannon must prove:

1. The parties were capable of contracting;
2. The existence of a contract;
3. The consideration;
4. The terms of the contract;
5. The Plaintiff has done what the contract requires or has been excused from doing what the contract requires;

6. The Defendant has breached the contract; and

7. The amount of any damage the Defendant has caused.

(Iowa Civil Jury Instruction No. 2400.1, *citing* Powell v. McBlain, 222 Iowa 799, 269 N.W. 883 (1936), *and* Port Huron Machinery Co. v. Wohlers, 207 Iowa 826, 221 N.W. 843 (1928). A breach of a contract occurs when a party fails to perform a term of the contract. (Iowa Civil Jury Instruction No. 2400.6, *citing* Metropolitan Transfer Station, Inc. v. Design Structures, Inc., 328 N.W.2d 532 (Iowa App. 1982), *and* Sheer Const., Inc. v. W. Hodgman and Sons, Inc., 326 N.W.2d 328 (Iowa 1982)).

Mr. Cannon pled that EPG has “refused to pay for or reimburse the cost of repairs or replacement of covered parts of [his] tractor” under the extended Purchased Protection Plan administered by EPG with respect to that tractor. (Plaintiff’s Second Amendment to Amended and Substituted Petition, ¶ 67; App. 56). EPG denied that allegation, and it affirmatively stated that it appropriately paid all claims submitted to it with regard to the tractor at issue. (EPG’s Answer and Affirmative Defenses, ¶ 67; App. 123-124). After a period of discovery, the evidence gathered conclusively showed that EPG was correct. It did not refuse to pay for or reimburse the cost of repairs or replacement of covered parts. Instead, EPG paid all the charges submitted to it during the effective period of

Purchased Protection Plan in satisfaction of its obligations under the Purchased Protection Plan.

There was no genuine issue of any material fact, and EPG was entitled to judgment in its favor as a matter of law. (Iowa R. Civ. P. 1.981(3)). EPG's Motion for Summary Judgment was correctly granted.

EPG did everything it was supposed to do during the life of the "Commercial Equipment Purchased Protection Plan" it issued with respect to this tractor. The Purchased Protection Plan at issue, with certain stated restrictions, "is limited to reimbursement of the cost of parts, and labor for repairs, approved by [EPG], and made by a service center authorized by [EPG], if a defect in material or workmanship is found in the [tractor]; ..." (EPG's Exhibit 1, ¶ 4; App. 681). Co-Defendant Windridge Implements, LLC, was the "service center" in this particular case.

Co-Defendant Windridge Implements, LLC, provided extensive discovery responses demonstrating how it dealt with the Purchased Protection Plan at issue and how it billed for its work with regard to this tractor. Windridge Implements stated the following with respect to the amounts it charged to EPG under the Purchased Protection Plan at issue:

Attached as Exhibits B and C are two service invoices from Windridge Implements, L.L.C. forwarded to EPG, Inc. seeking payment for warrantable items:

Exhibit B	W19723	\$21,237.03
Exhibit C	W21702	\$21,593.93

The attached invoice marked Exhibit B was submitted in the amount of \$21,237.03 by Windridge Implements, L.L.C. to EPG, Inc. for payment. Of that \$21,237.03 amount, the sum of \$19,458.21 was paid by EPG as shown by the attached Exhibit E. The remaining difference of \$1,778.82 was written off by Windridge.

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...

(EPG's Exhibit 2, p. 7, App. 691; Exhibits B, C, E, and F attached to EPG's Exhibit 2; App. 700-710; 716-717). Thus, far from refusing to pay under this Purchased Protection Plan, EPG paid out \$38,7850.16 related to the repair of the tractor in question, and an additional \$4,044.90 was written off at EPG's request.

As Windridge Implements, L.L.C., stated below, the invoices for service Windridge Implements believed to be covered by EPG's Purchased Protection Plan were, in fact, submitted to EPG for payment and were not submitted to Mr. Cannon for payment. (EPG's Exhibit 2, pp. 8, 9; App. 692-693). Further, according to Windridge Implements, L.L.C., no amounts were due and owing by

Mr. Cannon to Windridge for service to Mr. Cannon's Case IH 305 tractor. (EPG's Exhibit 2, p. 6; App. 691).

According to Windridge Implements, L.L.C., Mr. Cannon did pay a total of \$13,500 to Windridge Implements, L.L.C. The charges for which those payments were made are set out in Exhibit A to EPG's Exhibit 2. As Windridge Implements, L.L.C., stated, those charges were for "non-warrantable work including the rental of the tractor," that is, a replacement tractor.⁶ (Exhibit 2, p. 6; App. 691). Windridge Implements, L.L.C. did not submit those charges to EPG.

Mr. Cannon himself appeared to have disavowed the allegation in the pleadings that EPG has "refused to pay for or reimburse the cost of repairs or replacement of covered parts of [his] tractor" under the Purchased Protection Plan administered by EPG with respect to that tractor. (Plaintiff's Second Amendment to Amended and Substituted Petition, ¶ 67; App. 56). Mr. Cannon simply testified at his deposition that he believes that EPG should have paid bills

⁶ The cost of renting a replacement tractor is not covered under the Purchased Protection Plan in question because "Protection under the Plan is limited to reimbursement of the cost of parts, and labor for repairs, approved by [EPG], and made by a service center authorized by [EPG], if a defect in material or workmanship is found in the [tractor]; ..." (Commercial Equipment Purchased Protection Plan attached to Affidavit of Dale Hendrix, EPG's Exhibit 1, ¶ 4; App. 681).

that were not actually submitted to EPG for payment at all. For example, he believes that he “had to pay for the first set of or part of the first set” of brakes Windridge put on the tractor, costing him \$2,500. (Dep. of Jason Cannon, EPG’s Exhibit 3, p. 72:13-16; App. 720). He also believes that

... the numerous sets of hydraulic filters and among other oils and stuff should actually be considered into payment due to the fact that it [*i.e.*, the tractor] still has not been fixed.

(Dep. of Jason Cannon, EPG’s Exhibit 3, p. 72:16-20; App. 720).

But Mr. Cannon concedes that these claims were never submitted to EPG for payment. (Dep. of Jason Cannon, EPG’s Exhibit 3, p. 74:11-13; App. 722). Mr. Cannon further concedes that EPG actually did pay the amounts Windridge reports it paid. (Dep. of Jason Cannon, EPG’s Exhibit 3, pp. 74:24-75:10; App. 722-723). So his only concern “at this time” is that certain claims “ought to have been presented to EPG for payment and then paid by EPG.” (Dep. of Jason Cannon, EPG’s Exhibit 3, p. 75:10-16; App. 723). So, according to his deposition testimony, Mr. Cannon clearly no longer believes that EPG has “refused to pay for or reimburse the cost of repairs or replacement of covered parts of [his] tractor” under the Purchased Protection Plan at issue. (Plaintiff’s Second Amendment to Amended and Substituted Petition, ¶ 67; App. 56).

Scott Nordschow, service manager at Windridge, testified at his deposition that he was satisfied with EPG’s actions related to the tractor at issue

in this case. (Dep. of Scott Nordschow, EPG's Exhibit 4, p. 100:21-24; App. 729). Mr. Nordschow became familiar with EPG in his role at Windridge because EPG was, for a long time, the administrator of Purchased Protection Plans on Case IH products. (Dep. of Scott Nordschow, EPG's Exhibit 4, p. 97:3-10; App. 726). He testified that EPG never failed to pay on any claim Windridge made with respect to the tractor in question. (Dep. of Scott Nordschow, EPG's Exhibit 4, p. 100:8-11; App. 729). He could think of nothing that EPG could have done better with respect to this tractor. (Dep. of Scott Nordschow, EPG's Exhibit 4, pp. 100:25-101:3; App. 729-730). Thus, the sales manager at Windridge was satisfied that EPG performed its obligations owed to Mr. Cannon.

There is no genuine issue of material fact with regard to Mr. Cannon's allegations against EPG. It simply is not true that EPG "refused to pay for or reimburse the cost of repairs or replacement of covered parts of the tractor" at issue. (Plaintiff's Second Amendment to Amended and Substituted Petition, ¶ 67; App. 56). Mr. Cannon himself does not even think this is what happened. For this reason, Mr. Cannon cannot show that EPG breached its contract, as Mr. Cannon has alleged. Because there was no breach, EPG could not be held liable to Mr. Cannon for breach of contract. EPG respectfully requests that this Court affirm the entry of summary judgment in EPG's favor.

IV. The District Court Correctly Entered Summary Judgment in EPG's Favor Notwithstanding the Arguments Mr. Cannon Made in Resistance.

A. Despite Mr. Cannon's Use of the Term, the Purchased Protection Plan is Not a Warranty, and it is Not Subject to the Provisions of UCC Article 2.

Calling the Purchased Protection Plan a warranty does not make it a warranty. Mr. Cannon argues that the Purchased Protection Plan was a “warranty.” But it is the UCC and not Mr. Cannon which determines the definition of “warranty.” Iowa Code § 554.2313 reads, in the pertinent part, as follows:

1. Express warranties by the seller are created as follows:

- a. Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

...

(Iowa Code § 554.2313(1)(a) (underlining added)). So – crucially for Mr. Cannon's argument on EPG's summary judgment motion – it is the seller alone who makes express warranties for UCC purposes.

That is a problem for Mr. Cannon. Under the UCC, a “seller” is “a person

who sells or contracts to sell goods.” (Iowa Code § 554.2103(1)(d)). Contrary to Mr. Cannon’s argument made for the first time in this motion, EPG does not sell “goods.” For UCC, Article 2 purposes, “goods” are “all things (including specially manufactured goods) which are moveable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action.” (Iowa Code § 554.2105(1)). EPG does not sell “goods,” either through the Purchased Protection Plan or otherwise. Instead, EPG provides protection. The Purchased Protection Plan states that it is “a contract between the Provider [i.e., EPG] and the Customer [i.e., Mr. Cannon, for purposes of this motion] under which the Provider agrees to protect certain specified whole goods purchased by the Customer (the “Goods”) according to the terms and conditions set out herein.” (Purchased Protection Plan, ¶ 2, App. 681). The Purchased Protection Plan continues:

Protection under the Plan is limited to reimbursement of the cost of parts, and labor for repairs, approved by the Provider, and made by a service center authorized by the Provider, if a defect in material or workmanship is found in the Goods; ...

(Id., ¶ 4). So EPG sells no goods through the Purchased Protection Plan; rather, it protects goods by paying for repairs to goods, the responsibility for such repairs would otherwise fall upon the Customer – Mr. Cannon.

EPG can also prove that it is not a “seller” within the UCC because it makes no “sales” which are subject to UCC, Article 2. A “sale” under UCC, Article 2, “consists in the passing of title from the seller to the buyer for a price.” (Iowa Code § 554.2106(1)). Under the Purchased Protection Plan, EPG passes no title to any goods to any buyer for any price. EPG does not supply the parts for use in repairing goods like Mr. Cannon’s tractor. It simply pays for parts supplied by others on Mr. Cannon’s behalf in the context of authorized repairs to goods. (Purchased Protection Plan, ¶ 4; App. 681). So, emphatically, EPG is not a “seller” for UCC, Article 2 purposes.

Since EPG is not a “seller” for UCC, Article 2 purposes, neither can EPG create “express warranties” for UCC, Article 2 purposes. It is thus inaccurate for Mr. Cannon to describe the Purchased Protection Plan as a “warranty.” It is not a warranty.

B. Because the Purchased Protection Plan is Not Subject to the Provisions of UCC Article 2, and Because the Remedy Provided By the Purchased Protection Plan Has Not Failed, Mr. Cannon’s Current “Fails-of-its-Essential-Purpose” Argument Cannot Succeed.

The argument stated at IV.A., *supra*, is fatal to Mr. Cannon’s “fails-of-its-essential-purpose” argument. Mr. Cannon’s “fails-of-its-essential-purpose” argument is based upon the following language from the UCC:

554.2719 CONTRACTUAL MODIFICATION OR LIMITATION OF REMEDY.

1. Subject to the provisions of subsections 2 and 3 of this section and of section 554.2718 on liquidation and limitation of damages,
 - a. the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and
 - b. resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
2. Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this chapter.

...

(Iowa Code § 554.2719(1) and (2)). Thus, according to the Iowa Code, where there is an “agreement” under UCC, Article 2, that “agreement may change or limit the default contractual remedies stated in UCC, Article 2. It is a freedom-to-contract provision. But that freedom to contract is limited somewhat by the principle that each contracting party must have at least minimum adequate remedies available to that party. (Iowa Code § 554.2719, *cmt.* 1). EPG does not quibble with that basic principle.

EPG does differ with Mr. Cannon quite starkly in the following ways:

(1) the Purchased Protection Plan is not an “agreement” subject to UCC, Article 2, so UCC, Article 2 has no application to the Purchased Protection Plan; and
(2) the Purchased Protection Plan provides a perfectly adequate remedy if EPG fails to do what it promised to do in the Purchased Protection Plan. The problem Mr. Cannon faces is that EPG has not in any way failed to do what it promised to do in the Purchased Protection Plan. For both of these reasons, EPG was justly entitled to summary judgment in its favor on Mr. Cannon’s claims.

First, the Purchased Protection Plan is not an “agreement” for UCC, Article 2 purposes. “Agreement” is a specially-defined term in UCC, Article 2. Iowa Code § 554.2106 states, in the pertinent part, as follows: “... ‘contract’ and ‘agreement’ are limited to those relating to the present or future sale of goods.” (Iowa Code § 554.2106(1)). As stated at length above, the Purchased Protection Plan is not a contract for the sale of goods; instead, it is a contract under which EPG agrees to pay in place of the “Customer” – here, Mr. Cannon – for specific repairs in specific goods under specific terms. Since the Purchased Protection Plan is thus not an “agreement” for UCC, Article 2 purposes, Iowa Code § 554.2719 has no application in this case as between Mr. Cannon and EPG. And since the “fails-of-its-essential-purpose” argument upon which Mr. Cannon depends is only effective in the context of an “agreement” subject to UCC,

Article 2, that argument cannot be successful against EPG. EPG was properly entitled to summary judgment in its favor on Mr. Cannon's claims.

Second, if EPG had failed to do what it promised to do in the Purchased Protection Plan – which it has not – Mr. Cannon would still have an effective remedy for that non-existent failure. Again, all that EPG promised to do in the Purchased Protection Plan is to provide “protection” to Mr. Cannon through “reimbursement of the cost of parts, and labor for repairs, approved by [EPG], and made by a service center authorized by [EPG], if a defect in material or workmanship is found in the Goods; ...” (Purchased Protection Plan, ¶ 4; App. 681). It is expressly provided in the Purchased Protection Plan that the Goods will be repaired “in consequence of a request for reimbursement authorized by [EPG].” (Purchased Protection Plan, ¶ 5; App. 681). As demonstrated in EPG's Motion for Summary Judgment, EPG has paid for all claims submitted to it during the effective term of the Purchased Protection Plan with regard to the tractor at issue. So, to be clear, EPG has not failed to do anything it promised in the Purchased Protection Plan that EPG would do.

Had EPG failed to do anything it promised to do, there is a perfectly adequate remedy in the Purchased Protection Plan for such a non-existent failure. That is,

THE REMEDIES OF HAVING A DEFECT IN

MATERIAL OR WORKMANSHIP REPAIRED,
OR HAVING DEFECTIVE MATERIALS
REPLACED, AT A SERVICE CENTER
AUTHORIZED BY THE PROVIDER UNDER
THE TERMS AND CONDITIONS OF THE
PLAN ARE THE CUSTOMER'S EXCLUSIVE
REMEDIES UNDER THE PLAN AND ARE IN
LIEU OF ANY OTHER REMEDY OR
REMEDIES OTHERWISE AVAILABLE.

(Purchased Protection Plan, ¶ 23; App. 683 (emphasis in original)).⁷ Since EPG only agreed to “reimbursement of the cost of parts, and labor for repairs, approved by [EPG], and made by a service center authorized by [EPG], if a defect in material or workmanship is found in the Goods; ...,” (Purchased Protection Plan, ¶ 4; App. 681), it is a perfectly adequate remedy to hold EPG to its promise to pay for repairs of defects and replacement of parts.⁸ That is what ¶ 23 of the Purchased Protection Plan does. So the remedy provided by the Purchased Protection Plan has not failed in any way. Because the remedy provided by the Purchased Protection Plan has *not* failed, Mr. Cannon’s current “fails-of-its-essential-purpose” argument *must* fail. EPG was entitled to summary

⁷ The Purchased Protection Plan envisions that any dispute between EPG and a Customer will be arbitrated and not decided in a lawsuit, but EPG has not taken action to enforce that provision to this point. (Purchased Protection Plan, ¶ 20; App. 682).

⁸It is important to note that such repairs and requests for reimbursement must occur “during the term of the Plan.” (Purchased Protection Plan, ¶ 5; App. 681).

judgment in its favor on Mr. Cannon's claims.

C. EPG is Not Required to Pay for the \$6,000 Mr. Cannon Paid Out in 2011.

EPG has not breached the terms of the Purchased Protection Plan. Mr. Cannon states that "EPG Insurance, Inc., did not pay for oil filters and other parts related to the failure of the transmission and brakes in an amount which included things that Jason Cannon paid in 2011 in the amount of \$6,000." (Plaintiff's Resistance, ¶ 3; App. 732). As is evidenced by Mr. Cannon's deposition testimony on this point, however, Mr. Cannon does not know where his \$6,000 went. (Cannon Depo., Aug. 20, 2014, pp. 73:2-74:3, App. 785). He does not, for example, know whether or not that \$6,000 went to rental of a replacement tractor, which would not have been a covered expense. (Purchased Protection Plan, ¶ 22(d)(xiii); App. 682). Indeed, according to co-defendant Windridge's discovery responses, Windridge billed \$11,195.00 to Mr. Cannon on December 30, 2010, and \$8,330.00 of that amount was for tractor rental. (Exhibit A to EPG's Exhibit 2; App. 694-699). Mr. Cannon then paid his \$6,000 on January 6, 2011. (EPG's Exhibit 2, p. 6 of 9; App. 690).

As stated in Windridge's discovery response, the amount Mr. Cannon paid was paid for "Windridge service invoices sent to Jason Cannon for non-

warrantable work including the rental of the tractor.” (Id.) So Mr. Cannon does not know for what purpose he paid the \$6,000 he references in his Resistance, and Windridge says it went for “non-warrantable work” and tractor rental. In any event, there is no indication the expenses at Exhibit A to EPG’s Exhibit 2 attached to EPG’s pending motion were ever approved by EPG or submitted to EPG for reimbursement. For this reason, under the Purchased Protection Plan’s clear terms, EPG was not required to pay for the charges of which Mr. Cannon now complains. (Purchased Protection Plan, ¶¶ 4-5; App. 681).

Mr. Cannon stated below that “[j]ust because Windridge did not submit the claim on Jason Cannon’s behalf does not foreclose Jason Cannon from getting reimbursed for these expenses.” (Plaintiff’s “Memorandum in Support of Resistance to MSJ,” p. 3; App. 737). Mr. Cannon provides no authority for that statement, nor could he. In fact, it is an incorrect statement based on Mr. Cannon’s incorrect understanding of how the Purchased Protection Plan works. EPG’s approval of expenses and submission of those expenses within the term of the Purchased Protection Plan are fundamental to how the Purchased Protection Plan works. (Purchased Protection Plan, ¶¶ 4-5; App. 681). EPG has paid all of the expenses it approved and which were submitted to EPG within the term of the Purchased Protection Plan. EPG was under no obligation to do more than it has done. EPG was entitled to summary judgment in its favor on

Mr. Cannon's claims.

D. The Cases Cited by Mr. Cannon Have No Application to This Case.

Mr. Cannon cites five cases in its brief as supportive of Mr. Cannon's argument therein. In fact, upon examination, none of those case have any application to this matter. These cases do not prevent the entry of summary judgment in EPG's favor here.

Mr. Cannon argues that RMP Industries Ltd. v. Linen Center, 386 N.W.2d 523 (Iowa App. 1986), provides authority for its position that the Uniform Commercial Code applies here. It does not. Under *RMP Industries* – an accord-and-satisfaction case with facts very dissimilar to the facts of the present case – a “mixed contract” is one under which both goods and services are provided; such as a contract with an artist for a painting or a contract for the installation of a water heater. (RMP Industries, 386 N.W.2d at 528). But the Purchased Protection Plan at issue is not such a “mixed contract.” It sells no goods. Instead, it merely reimburses the Customer for repairs done by an approved service center. If the Purchased Protection Plan is to be compared to another kind of contract, it might be compared to a home or car insurance policy, which would also pay for parts and labor in place of a policy-holder. Because no

goods are sold by the Purchased Protection Plan, it cannot be a “mixed contract” as described in *RMP Industries*, and UCC, Article 2 cannot apply. *RMP Industries* provides no support for Mr. Cannon.

Neither does Richards v. Midland Brick Sales Co., Inc., 551 N.W.2d 649 (Iowa App. 1996), support Mr. Cannon’s cause. In *Richards*, Mr. Cannon sued a company that sold bricks to a contractor who was building a brick house for the *Richards* plaintiff. The *Richards* plaintiff argued that the UCC, Article 2 statute of limitations should not apply because, the *Richards* plaintiff argued, the contract was a contract for providing bricks, not for the sale of bricks themselves as “goods.” Quite properly, the Iowa Court of Appeals held that the contract under which the brick supplier supplied bricks to the contractor was a contract for the sale of goods, making UCC, Article 2 applicable. The *Richards* plaintiff lost that argument.

All parties to this action likely can agree that a contract for the sale of bricks is a contract for the sale of “goods” as provided by UCC, Article 2. (*See* Iowa Code § 554.2105(1) (defining “goods” as “all things (including specially manufactured goods) which are moveable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action.”)). But what are the “bricks” being sold in the Purchased Protection Plan? Indeed, the Purchased Protection Plan

sells no goods whatsoever. The *Richards* case is of no help at all to Mr. Cannon.

Design Data Corp. v. Maryland Casualty Co., 503 N.W.2d 552 (Neb. 1993), is not helpful to Mr. Cannon, either. In that case, a buyer of a computer system testified that he believed that he was buying hardware, software, a license to use the software, installation of the system, and a three-day seminar – thus, a mixed goods-and-services contract. The Nebraska Supreme Court, however, applying the “predominant purpose test,” determined that the hardware and software “were the essential elements of the sale.” (Design Data Corp., 503 N.W.2d at 557). Thus, the UCC applied to that transaction. (Id.)

Here again, Mr. Cannon’s case against EPG is quite different from *Design Data Corp.* in that there is no mixed goods-and-services contract at issue. EPG sells no goods. It is not selling the tractor; rather, it is selling a strictly limited service of paying for certain repairs to a covered tractor made within a tightly-circumscribed time period. Since there are no goods being sold, there is no mixed goods-and-services contract, and there is no chance that the UCC should apply in Mr. Cannon’s case.

Neither does Brandt v. Boston Scientific Corp., 792 N.E.2d 296 (Ill. 2003), support Mr. Cannon’s cause. In that case, the plaintiff sued a hospital where she had a medical device implanted, claiming that the transaction with the hospital was covered by UCC Article 2 because the transaction was primarily for

goods – that is, the medical device, rather than for services. The Illinois Supreme Court applied the “predominant purpose test” and determined that the transaction between the plaintiff and the hospital was primarily one for services and not for goods. (Brandt, 792 N.E.2d at 303-304).

The Purchased Protection Plan in this case was even more clearly a transaction for services rather than goods. In *Brandt*, the only reason it was even a question was that the hospital “sold” the plaintiff a medical device by surgically implanting it into her body. By contrast, EPG sold Mr. Cannon no goods whatsoever; it only sold him – or, more accurately, his predecessor in interest – the service of agreeing to pay for certain repairs to his tractor during a certain specified period of time. Not only was this contract not “predominantly” for services, it was for services only, and not at all for goods.

Finally, Midwest Hatchery & Poultry Farms, Inc. v. Doorenbos Poultry, Inc., 783 N.W.2d 56 (Iowa App. 2010), fails to support Mr. Cannon’s claims. First, that case again involves a sale of goods, which would be subject to UCC, Article 2. As argued supra, the present case involves no such sale of goods, making *Midwest Hatchery* easily distinguishable from the present case.

Second, as *Midwest Hatchery* states, “[a] remedy’s essential purpose is to give to a buyer what the seller promised him.” (Midwest Hatchery, 783 N.w.2d at 62). EPG made no promises to Mr. Cannon about the tractor. Since EPG

did not sell the tractor to Mr. Cannon, EPG could not make any UCC-covered warranties regarding the tractor, as argued more fully *supra*. Instead, EPG promised that it would – subject to the terms and conditions of the Purchased Protection Plan – reimburse Mr. Cannon for expenses submitted to EPG for parts and labor in connection with work authorized by EPG at a service center likewise authorized by EPG if a defect in material or workmanship was found in the tractor. (Purchased Protection Plan, ¶¶ 2-5; App. 681). That is what Mr. Cannon’s predecessor-in-interest contract with EPG for, and EPG has fulfilled its end of the bargain. Even if the UCC “failed-of-its-essential-purpose” provision as stated in *Midwest Hatchery* applied here – which it does not – this Purchased Protection Plan did not fail of its essential purpose.

E. Even if Mr. Cannon Had Preserved Error on His Agency Argument, Such an Argument Cannot Be Successful.

Assuming for the sake of argument that Mr. Cannon had preserved error on his agency argument, that argument would not have succeeded. This Court should not reverse the District Court’s entry of summary judgment in EPG’s favor.

Mr. Cannon argues without basis in fact that “it is clear that EPG is acting as an agent for Case for supervising and paying for repairs to its

equipment,” and therefore, in Mr. Cannon’s view, EPG “can be held responsible as an agent for the manufacturer, Case, ...” (Mr. Cannon’s Brief, p. 41). It is difficult for EPG to respond to this argument since it is made for the first time in this appeal. However, on this summary judgment record, it is evident that Mr. Cannon cannot succeed on this newly-asserted agency argument.

The Iowa Supreme Court has written:

The burden of proving an agency is upon the party asserting its existence. [Citation omitted]. Although whether an agency exists ordinarily is a fact question, there must be substantial evidence on the question to generate a jury question; a scintilla is not enough. [Citation omitted].

(Chariton Feed and Grain, Inc. v. Harder, 369 N.W.2d 777, 789 (Iowa 1985)).

The test for whether or not an agency relationship exists has been stated as follows:

An agency results from the manifestation of consent by one person, the principal, that another, the agent, shall act on the former’s behalf and subject to his control, and consent by the other to so act. [Citations omitted].

(Id. at 789-790 (quotation marks and italics omitted)).

Though Mr. Cannon alleges that EPG and co-appellee Case are in a principal-agent relationship in which Case is the principal and EPG is the agent, Mr. Cannon does nothing more than assert that “it is clear” that is the case. Far

from showing by “substantial evidence” that Case and EPG are in a principal-agent relationship, Mr. Cannon fails to offer even a “scintilla” of evidence of such a relationship between the two. Mr. Cannon offers no evidence of any “manifestation of consent by [Case] that another, [EPG], shall act on the former’s behalf and subject to his control, and consent by [EPG] to so act.” (Id.) In the absence of any evidence of an agency relationship between Case and EPG, Mr. Cannon could not have survived summary judgment on his agency argument – even if he had raised it before the District Court to be decided, which he did not.

If this Court decides to consider Mr. Cannon’s agency argument notwithstanding Mr. Cannon’s failure to raise it before the District Court for decision, EPG respectfully requests that the District Court’s entry of summary judgment in EPG’s favor nevertheless be affirmed.

CONCLUSION

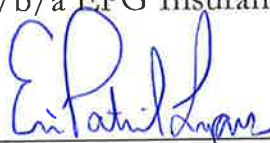
For the reasons stated herein, the Appellee, Eck & Glass, Inc., d/b/a EPG Insurance Co., respectfully requests that the District Court’s grant of summary judgment in its favor be affirmed.

Respectfully Submitted,

DUTTON, BRAUN, STAACK
& HELLMAN, P.L.C

Attorneys for the Appellee, Eck & Glass, Inc.,
d/b/a EPG Insurance Co.

BY:



Michael A. McEnroe, AT0005251

Erin Patrick Lyons, AT0004800

3151 Brockway Road

P.O. Box 810

Waterloo, Iowa 50704

(319) 234-4471

(319) 234-8029 FAX

mcenroem@wloolaw.com


lyonse@wloolaw.com

CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 8,153 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 with Garamond 14-point font.

Dated this 30th day of November, 2015.

By: 
Erin Patrick Lyons, AT0004800

CERTIFICATE OF FILING

I, Erin Patrick Lyons, hereby certify that on the 30th day of November, 2015, the undersigned electronically filed this document using the Electronic Document Management System.

By: 
Erin Patrick Lyons, AT0004800

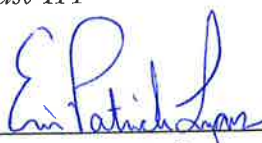
CERTIFICATE OF SERVICE

I, Erin Patrick Lyons, hereby certify that on the 30th day of November, 2015, I electronically served the attached Appellee's Final Brief upon the following counsel of record using the Electronic Document Management System:

Judith O'Donohoe / John Slavik
Elwood, O'Donohoe, Braun & White, LLP
116 North Main St.
P.O. Box 307
Charles City, IA 50616
Attorneys for Plaintiff

A. John Arenz
O'Connor & Thomas, P.C.
Roshek Building
700 Locust Street, Suite 200
Dubuque, IA 52001-6874
Attorneys for Bodensteiner Implement Company

Richard J. Kirschman
Whitfield & Eddy, P.L.C.
317 Sixth Avenue, Suite 1200
Des Moines, IA 50309-4195
Attorneys for CNH America LLC, d/b/a Case IH

By: 
Erin Patrick Lyons, AT0004800